

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 29, 2008 Session

STATE OF TENNESSEE v. SHIRLEY P. SPINA

Appeal from the Criminal Court for Knox County
No. 72715 James B. Scott, Judge, Sitting by Designation

No. E2007-02074-CCA-R3-CD Filed February 6, 2009

The defendant, Shirley P. Spina, appeals from the Knox County Criminal Court's denial of her motion to withdraw her "no contest" pleas to aggravated assault, a Class C felony, and unlawful possession of a weapon, a Class A misdemeanor. We hold that the trial court erred in denying the defendant a hearing on her motion to withdraw her pleas, and we vacate the judgments and remand for a hearing on the motion to withdraw the pleas.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Vacated,
Case Remanded**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and D. KELLY THOMAS, JR., JJ., joined.

Mark E. Stephens, District Public Defender, and Robert C. Edwards, Assistant Public Defender, for the appellant, Shirley P. Spina.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Kevin James Allen, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant was charged with two counts of aggravated assault and two counts of unlawful possession of a weapon as a result of an incident which occurred during the defendant's exchange with her ex-husband of their seven-year-old child for visitation purposes. There was evidence that the defendant pointed a semi-automatic handgun at her ex-husband and stabbed him with a syringe.

The defendant was indicted in March 2001, and she was arraigned in July 2001. The case was then continued for a variety of reasons. The record reflects that the defendant was represented by several retained attorneys throughout the proceedings in the trial court, and it appears that she had a variety of disagreements with at least some of these attorneys. Attempts to reach a plea agreement were unsuccessful, as was the defendant's bid for pretrial diversion. The case was set for trial on

several occasions but remained pending due in part to the entry and exit of various defense counsel in the case.

On August 2, 2005, the defendant's case was set for trial. However, the defendant's attorney of record sought to withdraw. Counsel stated that the defendant had made an effort to hire another attorney and was attempting to have money wired to the other attorney. Judge Mary Beth Leibowitz expressed her dismay that the defendant was not prepared for trial despite the fact that it had been set for trial nine times¹ and stated that she could not "let [the defendant] control this case any longer." The court stated that it was prepared to order that the defendant be taken into custody and that a new bond hearing would be held, at which the defendant could be represented by the new attorney. The parties then conferred and reached a plea agreement while the court considered other matters.

The parties announced that they had reached an agreement for the defendant to plead to one count of aggravated assault and one count of unlawful possession of a weapon, without an agreement as to sentencing. Defense counsel stated that the defendant probably would petition the court for judicial diversion. The defendant then entered "no contest" pleas to the agreed offenses.

The defendant's case next came before the court after defense counsel filed a motion to withdraw from representation. Judge Leibowitz stated that it was her understanding that the defendant "want[ed] to go back and take away her plea, and start over again and have a trial." The court granted counsel's motion to withdraw. The defendant stated that she was without funds to retain an attorney but anticipated receiving funds within thirty days. However, the attorney she identified as her counsel of choice appeared in court and declined to represent the defendant. The court then appointed the public defender to represent the defendant.

Through her newly-appointed attorney, the defendant filed a motion to withdraw her "no contest" pleas. Judge Leibowitz began conducting a hearing on that motion, at which the defendant testified that she was not guilty of the offenses to which she entered her no contest pleas but that she had pled to them on August 2 because her attorney told her that unless she did so, she would go to jail that day. She stated that she was without money for bail. The defendant said that she had been employed by the law firm where the attorney practiced who represented her on August 2, that she had been paid in cash in order for the firm to avoid payroll taxes, and that there was a dispute about overtime pay. At this point, the court met with the attorneys in chambers, and a transcript of that meeting is not part of the record. Judge Leibowitz returned to open court and announced that she was recusing herself from ruling on the defendant's motion to withdraw her pleas because the judge had been a party to a discussion on August 2 with defense counsel and the assistant district attorney about the defendant going to trial or to jail that day. The judge expressed her concern that she might be a witness to the proceeding.

The case was transferred to another division of Knox County Criminal Court and was assigned to Judge Ray Lee Jenkins. According to a pleading filed by the defendant, the State made

¹The assistant district attorney general stated there had been seven trial settings.

an oral motion to dismiss the motion to set aside the guilty plea without a hearing on November 17, 2006. The record does not contain a transcript of any proceedings on that date. However, the defendant filed a written response opposing the State's motion, in which she alleged that "[t]he record does not contain enough information by itself to allow the court to rule on her request to set aside her plea." The defendant submitted her own affidavit as a proffer. Judge Jenkins conducted a brief hearing on March 1, 2007, at which he did not receive evidence. The defendant requested that the court review the record and make a ruling whether it would allow a hearing on the motion to set aside the pleas. Thereafter, Judge Jenkins denied the defendant's motion to withdraw her pleas. No evidentiary hearing was conducted. The defendant then sought permission to file an interlocutory appeal, and Judge Jenkins denied the request. See T.R.A.P. 9.

On August 3, 2007, the case came before Judge James B. Scott, sitting by designation. On that date, defense counsel announced that the parties had reached an agreement whereby the defendant would received an effective sentence of six years on probation and the State would not oppose diversion. Defense counsel stated that the defendant wanted to reserve the right to file an appeal pursuant to Tennessee Rule of Appellate Procedure 3 of Judge Jenkins' ruling on the motion to set aside the pleas. Judge Scott accepted the agreement, stating

I'm not going to do anything other than sign an order that these gentlemen prepare after announcing this to me. Of course, we don't know when Judge Jenkins will be back, and the State has agreed to this, and so, basically speaking, all I'm saying is I'm not going to bother my mind very much with this, just submit an order and I will sign it. . . .

Judge Scott signed judgments which reflect that the defendant pled guilty, rather than entered "no contest" pleas. The judgments contain no reference to judicial diversion, and Judge Scott made no findings on the record regarding the propriety of diversion, nor did he orally grant or deny diversion.

The defendant filed this appeal, contending (1) that Judge Leibowitz erred in accepting the defendant's no contest pleas because the pleas were not in compliance with Tennessee Rule of Criminal Procedure 11 and (2) that Judge Jenkins erred in denying the motion to withdraw the pleas without first allowing an evidentiary hearing. After the parties' oral arguments, this court ordered the parties to submit supplemental briefs addressing whether the court lacked jurisdiction to consider the appeal pursuant to Tennessee Rule of Appellate Procedure 3 based upon the parties' representations that the defendant received judicial diversion.

Our preliminary concern in this case is whether we have jurisdiction of the defendant's appeal. If the defendant received judicial diversion, she has no appeal as of right because no judgment has been entered from which to appeal. See *State v. Norris*, 47 S.W.3d 457 (Tenn. Crim. App. 2000); see also T.C.A. § 40-35-313(a)(1)(A) (Supp. 2007) (providing that in cases of a defendant qualified for judicial diversion, the trial court may defer proceedings and place defendant on probation "without entering a judgment of guilty"). However, the record reflects that despite the

discussion of diversion, the trial court ultimately entered judgments of conviction.² Because the record contains judgments of conviction, we hold that the defendant has an appeal as of right from those judgments and that this court has jurisdiction of the appeal.

We consider, then, the defendant's complaint that Judge Jenkins erred in denying her motion to withdraw her "no contest pleas" without conducting a hearing. Tennessee Rule of Criminal Procedure 32(f) permits a defendant to withdraw a guilty plea under certain circumstances. If a sentence has yet to be imposed, the trial court may grant a motion to withdraw "for any fair and just reason." Tenn. R. Crim. P. 32(f)(1). The decision whether to allow the defendant to withdraw the plea is within the discretion of the trial court, and its decision will not be reversed absent an abuse of discretion. State v. Crowe, 168 S.W.3d 731, 740 (Tenn. 2005).

As the moving party, the defendant bore the burden of demonstrating a fair and just reason for withdrawal of her pleas. She was allowed to begin her proof before Judge Leibowitz, who decided mid-hearing that she must recuse herself. Thereafter, Judge Jenkins denied the motion to withdraw the pleas without allowing the defendant to present all her proof. This was error. We therefore must vacate the judgments and remand the case with instructions that the defendant be afforded a hearing on her motion to withdraw the guilty pleas.

The defendant has also raised a claim that Judge Leibowitz failed to comply with Tennessee Rule of Criminal Procedure 11 in accepting the defendant's pleas because the judge did not (1) consider the views of the parties and the interest of the public in the effective administration of justice, (2) describe the nature of the charges, (3) advise the defendant that self-defense was a legal defense, (3) inform the defendant that she had a right to plead not guilty, (4) advise the defendant of her right to remain silent and to avoid self-incrimination, and (5) inform the defendant that she was required to answer questions under oath and that her responses could be used against her in subsequent perjury proceedings. See Tenn. R. Crim. P. 11. The defendant contends that these alleged Rule 11 deficiencies contributed to a coercive environment in which she entered her pleas. We believe that the defendant's complaint regarding the sufficiency of the advice given pursuant to Rule 11 at the time of the pleas should be considered by the trial court at the hearing on the motion to withdraw the pleas. The petitioner will have the opportunity at that hearing to present all factual bases upon which she contends there is a fair and just reason that she should be allowed to withdraw her pleas.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are vacated. The case is remanded for a hearing on the motion to withdraw the defendant's pleas.

²We note, as well, that the judgments of conviction reflect guilty pleas, rather than no contest pleas. The transcript of the plea hearing reflects that no contest pleas were entered, and the record does not contain any explanation for this discrepancy. However, the parties have presented no allegation of error on appeal relative to the "guilty" designation in the judgments.

JOSEPH M. TIPTON, PRESIDING JUDGE